LIBRARY
SUPREME COURT U.S.

Office Supreme Court, U.S.
FILED
AUG 12 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 365

CITY OF NASHVILLE, ET AL., *Appellants*;

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

ALLISON B. HUMPHREYS,
Supreme Court Building,
Nashville, Tennessee.
HAROLD SELIGMAN,
Cordell Hull Building,
Nashville, Tennessee.
WILLIAM WALLER,
American Trust Building,
Nashville, Tennessee.
Attorneys for Appellants.

Of Counsel:
GEORGE F. MCCANLESS,
HENRY C. FOUTCH,
Supreme Court Building,
Nashville, Tennessee.
ELMER D. DAVIES, JR.,
Davidson County Court House,
Nashville, Tennessee.
LA ROE, WINN & MOERMAN,
Investment Building,
Washington 5, D. C.
WALLER, DAVIS & LANSDEN,
American Trust Building,
Nashville 3, Tennessee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Statutes Involved	4
Questions Presented	4
Statement of the Case	10
The Questions Presented Are Substantial	13
1. Was the transportation policy of Congress correctly interpreted?	13
2. Does the record show the existence of an unlawful combination in restraint of trade between the two railroads, and if so, is such violation of the Sherman Act a proper consideration?	18
3. Was Section 5(2)(c) of the Interstate Commerce Act correctly interpreted in connection with "the interest of the carrier employees affected," and should the District Court have dismissed the complaint after refusing to approve the Commission's order except upon an "express condition" which was not in the order?	27
4. Were prejudicial procedural errors committed by the Commission in declining to issue a subpoena duces tecum and in unduly restricting cross-examination?	30
5. Did the District Court give full scope to its responsibilities with respect to judicial review?	38
6 & 7. Did the Commission commit prejudicial errors of law in evaluating the evidence?	39
8. Did the report of the Commission meet the requirements of the Administrative Procedure Act?	44

Page

9. Was the conclusion "that the transaction will be consistent with the public interest" supported by the record? 45

10. Is it a matter of national concern (assuming that the order is otherwise valid) whether the two railroads "consolidated" under state law, or "merge" under a nonexistent law; and if so, is that issue justiciable in this cause? 45

11. Did the plaintiff and intervening plaintiff have "standing" to attack the order of the Commission because Mercantile-Safe Deposit & Trust Company of Baltimore was not a party and the Commission did not find that acquisition of control of the Tennessee Company by it would be consistent with the public interest? 50

12. Whether the judgment should be reversed because the order of the Commission did not comply with the thirty-day requirement of Section 15(2) of the Interstate Commerce Act 52

APPENDIX A: 1a

Findings of Fact and Conclusions of Law of District Court 1a

Order of District Court 14a

Order-Bond of District Court 16a

APPENDIX B: 17a

Administrative Procedure Act 17a

Sherman Act 20a

Interstate Commerce Act 20a

Tennessee Statutes Concerning Corporate Consolidations 27a

APPENDIX C: 31a

House Resolution 2142, 85th Congress, 1st Session 31a

Representative Celler's Press Release of January 7, 1957 ..... 32a

CASES CITED Page

Akwell Corp. v. Eiger, (D.C. N.Y. 1956) 141 F. Supp. 19 46
Alleghany Corp v. Breswick & Co., (U.S. Supreme Court, April 22, 1957) 9, 11, 18, 50
Ayrshire Collieries Corp. v. United States, (1947) 331 U.S. 132 4
Chesapeake & Ohio Rwy. Co. Purchase, 271 I.C.C. 5 24
Claiborne-Annapolis Ferry v. United States, (1932) 285 U.S. 382 47
Consolidation of Railroads, 159 I.C.C. 522 16
Control of Central Pacific by Southern Pacific, 76 I.C.C. 508 24
Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc., (1954) 60 M.C.C. 321 23
F.P.C. v. Idaho Power Company, (1952) 344 U.S. 17 .. 29
Fort Worth & D. C. Rwy. Co. Lease, 247 I.C.C. 119 27, 28
Gulf, Mobile & Ohio Railroad Company Purchase, Securities, Etc., 261 I.C.C. 405 16
Hopkins Savings Association v. Cleary, (1935) 296 U.S. 315 49
Illinois v. United States, (D.C. Ill. 1956) 146 F. Supp. 195 12
Interstate Circuit, Inc. v. United States, (1938) 306 U.S. 208 43
Keokuk & Western Railroad Co. v. Missouri, (1894) 152 U.S. 301 46
Kiefer-Stewart Co. v. Seagram & Sons, (1951) 340 U.S. 211 21
Knapp v. Golden Cross, (1908) 121 Tenn. 212 46
McLean Trucking Co. v. United States, (1944) 321 U.S. 67 ..... 13, 23, 39
Memphis, Etc. R.R. Co. v. Alabama, (1882) 107 U.S. 581 46
Nashua Railroad v. Lowell Railroad, (1890) 136 U.S. 356 46
National Labor Relations Board v. Highland Park Mfg. Co., (1951) 341 U.S. 322 50
New York Central Securities Co. v. United States, (1932) 287 U.S. 12 47
New York, Chicago & St. Louis Railroad Company Control, I.C.C., Docket No. 17,883, Decided October 7, 1955 20

Page

Norfolk Southern Bus Corporation v. Virginia Dare Transportation Company, (C.A. 4, 1947) 159 F. 2d 306 20
Pennsylvania R. Co. v. Chamberlain, (1933) 288 U.S. 333 40
Pennsylvania R. Co. v. Interstate Commerce Commission, (C.A. 3, 1933) 65 F. 2d 37 ..... 21, 26
Phillips v. United States, 312 U.S. 246 4
Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U.S. 146 37
Radio Corporation v. United States, (1951) 341 U.S. 412 39
Railway Labor Executives Ass'n v. United States, (1950) 339 U.S. 142 4
Reilly v. Pinkus, (1949) 338 U.S. 269 37
Seaboard Air Line Railroad Co. v. Daniel, (1948) 333 U.S. 118 ..... 48, 49
Secretary of Agriculture v. United States, (1956) 350 U.S. 162 44
Securities and Exchange Commission v. Chenery Corp., (1943) 318 U.S. 80 29
Southern Steamship Co. v. National Labor Relations Board, (1942) 316 U.S. 31 25
Stratton v. St. Louis S.W. Railway, (1930) 282 U.S. 10 4
Swift & Co. v. United States, (1952) 343 U.S. 373 3
Texas v. United States, (1934) 292 U.S. 522 46
Timken Co. v. United States, (1951) 341 U.S. 593 21
Town of Bethel v. Atlantic Coast Line Railroad Co., (C.A. 4, 1936) 81 F. 2d 60 46
United States v. Aluminum Co. of America, (C.A. 2, 1945) 148 F. 2d 416 21
United States v. E. I. DuPont de Nemours & Co., (U.S. Supreme Court, June 3, 1957) 22
United States v. Freight Association, (1897) 166 U.S. 290 19
United States v. Marshall Transport Company, (1944) 322 U.S. 31 50
United States v. Southern Pacific Company, (1922) 259 U.S. 214 ..... 20, 22, 23
United States v. Yellow Cab Company, (1947) 332 U.S. 218 21
Universal Camera Corp. v. National Labor Relations Board, (1951) 340 U.S. 474 ..... 38, 39

Page

STATUTES AND RULES CITED

Administrative Procedure Act, Section 6(c), 5 U.S.C. Sec. 1005(c) 4, 6, 36
Administrative Procedure Act, Section 7(c), 5 U.S.C. Sec. 1006(c) 4, 6, 36, 44
Administrative Procedure Act, Section 8(b), 5 U.S.C. Sec. 1007(b) 8, 44
Administrative Procedure Act, Section 10(e) 5 U.S.C. Sec. 1009(e) 6, 38
Federal Rules of Civil Procedure, Rule 52(a) 12
Interstate Commerce Act, Section 1, 49 U.S.C. Sec. 1 4
Interstate Commerce Act, Section 5, 49 U.S.C. Sec. 5 ..... 4, 20
Interstate Commerce Act, Section 5(1), 49 U.S.C. Sec. 5(1) 4
Interstate Commerce Act, Section 5(2), 49 U.S.C. Sec. 5(2) 10, 11, 14, 32
Interstate Commerce Act, Section 5(2)(b), 49 U.S.C. Sec. 5(2)(b) 36
Interstate Commerce Act, Section 5(2)(c), 49 U.S.C. Sec. 5(2)(c) 5, 12, 27, 28, 29
Interstate Commerce Act, Section 5(2)(f), 49 U.S.C. Sec. 5(2)(f) 5, 28, 29
Interstate Commerce Act, Section 5(4), 49 U.S.C. Sec. 5(4) 9, 23, 50, 51
Interstate Commerce Act, Section 5(11), 49 U.S.C. Sec. 5(11) 8, 46, 48, 49
Kentucky Revised Statutes, Sections 271.465 et seq. 45
Sherman Act, Section 1, 15 U.S.C. Sec. 1 ..... 4, 20, 22
Tennessee Code, Sections 65-901—65-908 ..... 45, 48, 49
28 U.S.C., Section 1253 3
28 U.S.C., Section 1336 2
28 U.S.C., Section 2101(b) 3
28 U.S.C., Section 2284 ..... 3, 4
49 U.S.C., Section 15(2) 9, 52

TEXTBOOKS AND ARTICLES CITED

A Critique of: "The Marasmus of the ICC: The Commission, The Railroads, and The Public Interest," by Charles S. Morgan, 62 Yale L.J. 171 24
Judicial Review: Question of Law, by Louis S. Jaffe, 69 Harvard L.R. 239 38

Page

Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, by Louis B. Schwartz, 67 Harvard L.R. 436 38
Standing to Challenge Governmental Action, 39 Minnesota L.R. 353 50
Wigmore on Evidence 43

MISCELLANEOUS

Financial Relations, Rates and Practices of the Louisville & Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway and Other Carriers, 33 ICC 168 ..... 13, 20
House Resolution 2142, 85th Congress, 1st Sess. 17
Time Magazine, June 3, 1957 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No.

CITY OF NASHVILLE, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellants, City of Nashville, Davidson County, Tennessee, the State of Tennessee, and Tennessee Public Service Commission, appeal from the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, entered on June 20, 1957, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal (subject to one qualification, to which the Court's attention will be called), and that substantial questions are presented.

OPINION BELOW

The District Court delivered no written opinion but filed findings of fact and conclusions of law, which have not been reported. Copies of the findings of fact and conclusions of law and judgment are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U. S. C., Section 1336, to enjoin, set aside and annul an order of the Interstate Commerce Commission, authorizing, among other things, the merger of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company, and the acquisition of direct control by the Atlantic Coast Line Railroad Company of the surviving corporation and indirect control of such corporation by the Atlantic Coast Line Company. The City of Nashville, as plaintiff, and the State of Tennessee, Tennessee Public Service Commission, Davidson County, Tennessee, NC&StL Railway Employees Job Protection Association, and Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually, and as representatives of a class composed of 839 employees of the Nashville, Chattanooga & St. Louis Railway, as intervening plaintiffs, alleged invalidity of the order of the Commission on various grounds.[1]

---

[1] For convenience, the Nashville, Chattanooga & St. Louis Railway will be referred to as the Tennessee Company, the N. C. & St. L., or the N. & C.; the Louisville & Nashville Railroad Company as the Kentucky Company or the L. & N.; the Atlantic Coast Line Railroad Company as the Coast Line; the Atlantic Coast Line Company as the Connecticut Company; and the Interstate Commerce Commission as the I.C.C. or the Commission.

The complaint was filed in the United States District Court for the Middle District of Tennessee at Nashville, presided over by District Judge William E. Miller. On account of his illness, Circuit Judge John D. Martin sat by designation, and issued a temporary restraining order on April 8, 1957. Following the filing of the complaint, the I.C.C. issued an order postponing for three days the effective date of the original order; and following the issuance of the temporary restraining order the I.C.C. issued a further order postponing the effective date indefinitely.

The Chief Judge of the Sixth Circuit, purporting to act pursuant to 28 U. S. C. 2284, designated District Judge Leslie R. Darr and District Judge Roy M. Shelbourne to sit with Judge Martin for the hearing of an application for an interlocutory injunction. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction. Following such hearing, findings of fact and conclusions of law were filed May 24, 1957, and judgment was entered on June 20, 1957, dismissing the complaint. Notice of appeal was filed in the United States District Court for the Middle District of Tennessee, Nashville Division, on July 26, 1957, after the I.C.C. had issued a new order, dated July 10, 1957, fixing August 14, 1957, as the new effective date of its original order.

Assuming that the three-judge court was properly constituted the jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by 28 U. S. C., Section 1253 and Section 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Swift & Co. v. United States,*

(1952) 343 U. S. 373; *Railway Labor Executives Ass'n. v. United States*, (1950) 339 U. S. 142.

If the three-judge court was not properly constituted[2] the judgment dismissing the complaint was, in effect, the action of a single judge, acting without jurisdiction, and the Supreme Court has no jurisdiction of the appeal. *Stratton* v. *St. Louis S. W. Railway*, 282 U. S. 10; *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in Appendix B hereto, including provisions of the Administrative Procedure Act, the Interstate Commerce Act, and the Tennessee corporation law.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the I.C.C. correctly interpreted the present transportation policy of Congress (Interstate Commerce Act, Title 49, U. S. Code, "national transportation policy" before Section 1, as well as Section 5, and Sherman Act, Title 15, U. S. Code, Section 1) as being to "'foster and promote" the voluntary union of railroads, to the end that the resulting combinations will be financially stronger and able to "meet more effectively competition from other modes of transpor-

[2] Par. 1 of 28 U. S. C., Section 2284, provides that the chief judge of the circuit "shall designate two other judges, at least one of whom shall be a circuit judge." Par. 5 provides that a single judge shall not "dismiss the action." The statute is "technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States*, 312 U. S. 246, 251.

tation" (which are said to be "subsidized" by Congress and by state and local governments), without regard to whether the lines of the railroads involved are naturally competitive rather than complementary; or whether they are able to continue to provide adequate transportation service to the public under separate managements; or whether any immediate and direct improvement in service to the public is contemplated as the result of the union.

2. Whether in appraising the effects of the curtailment of competition which will result from the proposed merger of the Tennessee Company into the Kentucky Company, it was sufficient for the I. C. C. to consider the effects of the elimination of "such competition as now exists," where the Kentucky Company owns 74.9 per cent of the capital stock of the Tennessee Company and has used said control (without I.C.C. approval) to maintain for many years a combination in restraint of trade by restricting and suppressing the latter's competition with respect to rates and routes; or whether the I.C.C. should have treated the status quo as unlawful and therefore abnormal, and should have considered whether the merger is more or less in the public interest than the situation which would exist if the unlawful combination in restraint of trade were discontinued.

3. Whether the I.C.C. correctly interpreted Section 5(2)(c) of the Interstate Commerce Act to mean that the adverse effect on employees resulting from the merger is not to be considered a disadvantage to the public interest, in determining whether the merger is, on balance, consistent with the public interest, so long as protective conditions for employees are imposed under Section 5(2)(f); and whether the District Court

properly dismissed the complaint after stating that its approval of the Commission's order was upon an "express condition" (not incorporated in the Commission's order) that the rights of the employees of both railroads "be protected equally . . . as relates to seniority and to other conditions of employment."

4. Whether the I.C.C. order approving the merger was issued "without observance of procedure required by law" after taking "due account" of the "rule of prejudicial error," (Title 5, U. S. Code, Section 1009(e)), where the I.C.C. declined to issue a *subpoena duces tecum* for "studies" alleged in the application for the merger to have been the basis of the decision to merge (Title 5, U. S. Code, Section 1005(c)), and where the Examiner restricted cross-examination "required for a full and true disclosure of the facts" (Title 5, U. S. Code, Section 1006(c)), by not requiring applicants' witnesses to produce on cross-examination these same "studies," (which related to the effect of the merger on traffic and on transportation service) or to produce figures called for by interveners to test the validity of *ex cathedra* opinions expressed by applicants' witnesses, and by excluding these studies and figures on the ground that since the burden of proof was on the applicants, it was "their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application.".

5. Whether the District Court in reviewing the order of the I.C.C. correctly interpreted Title 5, U. S. Code, Section 1009(e), and duly observed the requirements of the statute with respect to judicial review, or gave same too narrow a scope.

6. Whether evidence of anticipated "savings and economies" to be accomplished by the merger,—a major portion from the displacement of employees,—constituted a sufficient basis (although there was positive evidence to the contrary) for the inference by the I.C.C. that "the combined properties will be operated more efficiently than they are now under separate managements," or for the inference that in the "long run" improvement in service "should result," with the result that "the merger would enhance the adequacy of service by the merged companies and would constitute the best use of the facilities" of the involved companies; and whether these anticipated "savings and economies" are a sufficient advantage to the public interest, although "no immediate and direct improvement in service" is contemplated, "to outweigh the disadvantage to the single locality of Nashville" in determining whether the merger is, on balance, consistent with the public interest.

7. Whether the conclusion that the merger is consistent with the public interest should be sustained where the report affirmatively shows that the I.C.C. gave weight as considerations in favor of the merger to the fact that "no other carrier opposed the merger," the fact that "the numerous witnesses offered by the applicants overwhelmingly favored the proposed merger," and the fact that, "except for railway labor organizations the principal opposition to the proposed merger emanated from the city of Nashville and from Davidson County," while, on the other hand, the report fails to indicate that any weight whatever was given to expert testimony that the merger will not result in

the best use of the facilities, or to the failure of any officer of the Tennessee Company to testify in support of the opinions given by officers of the Kentucky Company, or to the refusal of the applicants to produce as a part of the record documents and figures called for on cross-examination by interveners in opposition, including "studies" which the application alleged to be the basis of the decision to merge.

8. Whether the report of the I.C.C. meets the requirements of the Administrative Procedure Act, Title 5, U. S. Code, Section 1007(b), in view of the fact that no grounds or reasons are given for rejecting the contentions on major issues in the controversy set forth in exceptions to the proposed report of the Examiner, but instead the portions of the proposed report to which the exceptions related are copied verbatim in the Commission's report, with the statement that rulings on the exceptions are "reflected in our findings and conclusions," and whether the conclusions are too "foggy" to meet the requirements of the Act.

9. Whether the conclusion of the I.C.C. "that the transactions will be consistent with the public interest" was based on adequate findings supported by substantial evidence (determined by a review of the whole record, or portions thereof cited by counsel) presented at hearings at which procedure required by law was duly observed.

10. Whether a justiciable issue presently exists in this cause with respect to the construction of Section 5(11) of the Interstate Commerce Act, or whether it is consistent with the Tenth Amendment, by reason of

the contention of appellants that Tennessee law authorizes a "consolidation" but makes no provision for a "merger" of the character proposed and "authorized"; and if a justiciable issue is presented, whether (a) Congress did intend to grant to the I.C.C. the power to supply deficiencies in state law, by authorizing a form of transaction with respect to which state law is silent, and (b) if Congress did so intend, whether Congress had the power, in view of the Tenth Amendment, to grant such power to the I.C.C.

11. (a) Whether effectuation of the merger, pursuant to the order of the I.C.C., would be a violation of Section 5(4) of the Interstate Commerce Act by the participants, on the theory that such merger would amount to the acquisition of control of the merged company by Mercantile-Safe Deposit & Trust Company of Baltimore, as sole trustee under various trusts, which already has control of other carriers but was not a party to the instant proceeding and whose acquisition of such control was not found by the I.C.C. to be consistent with the public interest; and if so whether it was the responsibility of applicants to raise the question, or for the Commission to raise it, *sua sponte;* and (b) whether the District Court should have considered the question, when called to its attention by plaintiff and intervening plaintiffs following the decision in *Alleghany Corporation* v. *Breswick & Co.,* April 22, 1957, or properly refused to consider it because the I.C.C. had not considered it.

12. Whether Section 15(2) of Title 49, U. S. Code, requiring orders of the I.C.C., other than orders for the payment of money, to take effect within "not less

than thirty days" relates to orders under Section 5(2); if so, whether an order complies with said requirement which is to take effect forty days from the date it bears, March 1, 1957, although not released until March 13, 1957, and if such an order does not comply, is its invalidity cured by subsequent orders, issued after an action has been filed to annul the original order on this and other grounds, which postpone the effective date of the original order, first for three days, and then indefinitely.

STATEMENT OF THE CASE

The Kentucky Company, the Tennessee Company, the Coast Line, and the Connecticut Company, hereinafter sometimes referred to collectively as the applicants, on January 28, 1955, jointly applied for authority under Section 5(2) of the Interstate Commerce Act, as amended, to merge the properties and franchises of the Tennessee Company and the Kentucky Company for ownership, management and operation. The Connecticut Company and the Coast Line joined in the application because of their control through stock ownership of the Kentucky Company. The application stated that the Kentucky Company controls the Tennessee Company through ownership of 74.9 per cent of its capital stock; that the Coast Line controls the Kentucky Company through ownership of 35.2 per cent of its common capital stock; and that the Connecticut Company controls the Coast Line through ownership of 28.58 per cent of its common and preferred capital stock. It further stated that the Kentucky Company, the Tennessee Company and the Coast Line were being operated and managed as separate entities.

Hearings were held by an Examiner, resulting in a proposed report, filed June 21, 1956, which recommended the merger. Exceptions were filed by various parties and oral argument held before the full Commission. On March 13, 1957 the Commission released its report and order, both dated March 1, 1957, approving the merger. The order was made effective forty days from date. The complaint in this cause seeking to enjoin, set aside and annul the order was filed March 29, 1957. The complaint, as amended, and the intervening complaints, as amended, alleged that the order was invalid on the various grounds reflected in the "Questions Presented" heretofore enumerated. Answers were duly filed and the case tried on the record, oral stipulations and statements of counsel in open court, and one exhibit filed by the plaintiff consisting of copy of an application filed July 6, 1956, by Mercantile-Safe Deposit & Trust Company of Baltimore with the Commission in Finance Docket No. 19261, involving application of the Coast Line and the Connecticut Company under Section 5(2) of the Interstate Commerce Act for authority to purchase the properties of the Florida East Coast Railway Company. This document, verified by Thomas B. Butler, President, who is also a director of the Kentucky Company, states that said Mercantile-Safe Deposit & Trust Company, as sole Trustee under various trusts, holds a majority of the voting stock of the Connecticut Company. Mercantile-Safe Deposit & Trust Company did not join in the application in the instant proceeding. The effect of the proposed merger, if consummated, would be the acquisition of control of the Tennessee Company by Mercantile-Safe Deposit & Trust Company. See *Alleghany Corporation* v. *Breswick & Co.*, decided April 22, 1957.

The District Court filed "Findings of Fact[3] and Conclusions of Law" but rendered no opinion discussing the questions presented by the complaint and again presented on this appeal. Conclusion of Law No. 5 makes the blanket statement that the Commission's "findings are supported by substantial evidence" and that they "constitute a sufficient basis for the order." Conclusion of Law No. 6 suggests that the Court deferred to the Commission as a "body of experts." The Court concluded that no ground had been shown which would "justify an order annulling, vacating or setting aside the order of the Commission." Conclusion of Law No. 10.

Without attempting to reconcile the apparent inconsistency, the District Court stated, however, that its approval of the Commission's order was "based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment." Presumably the Court's reasoning was that without this protection for N. & C. employees, the merger is not consistent with the public interest under Section 5(2)(*c*) of the Interstate Commerce Act. The Commission's order did not contain the "express condition" upon which the Court sustained it. Nevertheless the Court dismissed the complaint.

The comments which follow relate, by their respective numbers, to the "Questions Presented"

---

[3] Rule 52(a), Federal Rules of Civil Procedure, would appear inapplicable because there was no trial "on the facts." It has been so held by several courts. See *Illinois* v. *United States*, (D. C. Ill., 1956) 146 F. Supp. 195, 202, and cases cited.

heretofore stated. While it is submitted that all of said questions are substantial, discussion will be abbreviated of those which, while important to the decision of the instant case, are not of the same public importance as the questions discussed at greater length.

THE QUESTIONS ARE SUBSTANTIAL

QUESTION 1

Was the transportation policy of Congress correctly interpreted?

In *McLean Trucking Co.* v. *United States*, (1944) 321 U. S. 67, the Court considered the policy of Congress with respect to consolidations of motor carriers. After quoting from the "national transportation policy" (preamble to Transportation Act of 1940), the Court said (p. 86):

> ". . . The preservation of independent and competing motor carriers unquestionably has bearing on those ends."[4]

The Court has not, since the enactment of the Transportation Act of 1940, interpreted the policy of Congress with respect to the conditions under which voluntary mergers of rail carriers should be approved. In the instant case, the Commission expressed its

---

[4] Present day motor carrier mergers are comparable with railroad mergers of the 19th Century. The present Tennessee Company is a consolidation of more than twenty original companies and the present Kentucky Company is a consolidation of more than fifty original companies. See Appendix A and Appendix B, *In Re: Financial Relations, Rates and Practices of the Louisville & Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway and Other Carriers*, 33 I.C.C. 168.

understanding of the policy of Congress as follows (Sheets 38-39):

> "Nashville interveners in opposition contend that in the usual case where a merger will result in better use of transportation facilities, two weak roads are being merged to make a strong one, or a weak road is being merged into a strong one, and that such is not the case here, because the Tennessee Company is not a weak railroad nor does the Kentucky Company need strengthening. The provisions of section 5 (2) of the act do not contemplate the unification of only those railroads which no longer can continue under separate ownership. The purpose of the law is to *foster and promote* the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the public interest. *Detroit, T. & I. R. Co. Contrl.*, 275 I.C.C. 455, 489." (Emphasis supplied).

The Commission did not question the premise that the N. & C. is not a weak railroad. The Commission had previously said (Sheet 12):

> "Aided by a strategic location, progressive management, and a large investment in capital improvements, the Tennessee Company is an important carrier of long-distance interchanged traffic and with [unusual] effective solicitation and personalized service it has developed a large and profitable volume of such overhead business. Under its [able] management, the Tennessee Company's operating income per mile of road increased steadily from $1,420 in 1946 to $4,484 in 1954, and the corresponding figures for net income show an increase from $257 to $3,117."[5]

---

[5] The words in brackets were in the Examiner's report but were elided in the Commission's report.

With respect to the effects of the merger, the Commission said (Sheet 70):

> "Combining the facilities and resources of the Kentucky Company and the Tennessee Company under one management would give better control of mounting operating costs and enable the surviving company to meet more effectively competition from other modes of transportation. The anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad."

The Commission's statement that the "anticipated" accomplishments from the merger "would give assurance" of a stronger and financially more stable railroad is an inference or conclusion from an assumed premise, implying almost that the L. & N., after absorbing the N. & C., will be stronger and financially more stable than it is now. The Commission felt that this prospect justified the merger because the L. & N. could then compete more effectively with "other modes of transportation." We submit that the Commission's conception of the present national transportation policy is erroneous. Whatever may have been the pre-1940 policy, Congress is now equally concerned (1) with preserving other modes of transportation, and (2) with preserving independent and competing units in all of them.

The Commission's interpretation of the policy of Congress was found here to justify not merely the merger of two strong railroads, each of which is big enough to be operated at top efficiency,* but two rail-

* Vice President Parsons of the Kentucky Company quickly conceded on cross-examination, without qualification, that the Tennessee Company is "big enough to be operated at top efficiency."

roads which are naturally competitive rather than complementary. In *Gulf, Mobile & Ohio Railroad Company Purchase, Securities, Etc.*, 261 I.C.C. 405, the Commission said (p. 429):

> "The complementary relationship of the Gulf, Mobile & Ohio and Alton systems lies in the fact that the northern terminus of one is a southern terminus of the other. Purchase of the Alton's properties by the applicant will have the effect of extending the latter's system to Chicago and to Kansas City."

In the instant case the relationship is completely different, as will be later seen.

The Commission's interpretation of the policy of Congress induced it to approve this merger in spite of the fact stated by the Commission as follows (Sheet 69): "From the record it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger."[7] This statement of the Commission, compelled as the result of admissions on cross-examination of applicants' witnesses (Tr. 123, 249-250, 397-398,

---

(Tr. 400). In his concurring opinion in *Consolidation of Railroads*, 159 I.C.C. 522, at p. 526, Commissioner Eastman said:

> "There are strong grounds for belief that the best results in operating efficiency and service are secured when a railroad system is small enough so that the executive can maintain something like personal contact with the employees all down the line and also with the shippers in the territory served."

A recent authoritative statement is that of Secretary of Defense Wilson, who referred to the dangers of the "concentration of stupidity" as an argument in favor of decentralization of authority in a business enterprise such as General Motors. Time, June 3, 1957, p. 13.

[7] The Commission said that "nevertheless" the merger "should, in the long run, result in improvement of the service." See discussion under Questions 6 and 7.

402-405); is in direct contrast with the averment in the application: "The reason for the proposed merger is to provide improvements in public service . . ." (p. 31), and with the averment: "The proposed merger would continue the transportation service which the two lines are offering to the public, but it would be more coordinated, economical, efficient, and expeditious service to the public." (p. 33).

The language of the Commission in the instant case, when considered in the context of the facts, means that any two connecting railroads should automatically be given permission to merge if they wish to do so, provided no other carrier objects and there is no alternative proposal under consideration. The arguments in favor of the present merger could be advanced in favor of any such railroad consolidation plan. Advantages to the public in any merger of connecting lines are assumed to be inherent. If such is the policy of Congress, is it also the policy of Congress to create motor carrier, barge, and air line monopolies to compete with the rail monopolies?

If reasonable and substantial doubt exists as to the interpretation of the policy of Congress, the more prudent course would be, we submit, for the Court to resolve the doubt against a merger of this character. Congress may amend the law to correct the error, if one is committed, and to make it plain that its policy is to foster and promote mergers of strong railroads, and to eliminate actual and potential competition between them, so that competition with other modes of transportation can be more effectively met.[8] But once

[8] H. R. 2142, introduced by Representative Celler, Chairman of the House Judiciary Committee, January 8, 1957, is based on the theory that "Rulings by administrative bodies and judicial deci-

a merger of this character is accomplished, the *status quo* cannot easily be restored. Cf. *Alleghany Corporation* v. *Breswick & Co.*, decided April 22, 1957, pointing out that "A merger is the ultimate in one company obtaining control of another" and referring to La Fontaine's fable of the crow, the cheese, and the fox, as demonstrating that "there is a substantial difference between holding a piece of cheese in the beak and putting it in the stomach."

QUESTION 2

Does the record show the existence of an unlawful combination in restraint of trade between the two railroads, and if so, is such violation of the Sherman Act a proper consideration?

Appellees have not questioned the fact that continuously since 1880, when the L. & N. acquired most of the 74.9 per cent of the capital stock of the N. & C. now owned by it, the latter's competition has been restricted or suppressed through the use of this stock control. Indeed the applicants went so far in their brief before the Commission as to say (p. 24): "Whatever competition existed between the two railroads was destroyed in 1880 and cannot again be destroyed by the proposed merger." The background of this assertion was the contention by interveners in opposition to the merger that in fact a substantial amount of competition between the two railroads still existed, especially with respect to solicitation and service, and that the elimination of even this limited competition was contrary to the public interest.

---

sions have unduly expanded authorized exceptions from the antitrust laws." (Press release, January 7, 1957, by Representative Celler). An identical bill was subsequently introduced in the Senate by Senator Kefauver, Chairman of the Antitrust and Monopoly Subcommittee. See Appendix C for the bill in full and excerpts from Representative Celler's press release.

Again, in their reply to the exceptions to the proposed report of the Examiner filed by the City of Nashville, et al., the applicants said (p. 49):

> ". . . Competition, except in the 'salesman' sense, just does not exist. Witness Tilford related the policy under which the two properties were operated and pointed out that insofar as competition between the two companies was concerned, there was only 'salesman activity.'"

The contention of the railroads has been that the alleged destruction of competition in 1880 makes lawful the continuing destruction of this same competition from the date of the Sherman Act down to the present time. The District Court apparently accepted this contention in Conclusion of Law No. 8. The Court did not cite or attempt to distinguish the authorities to the contrary urged upon the Court by appellants.[9]

The word "destruction" when applied to competition does not necessarily mean that potential competition is also destroyed. Destruction of competition can be a continuing thing. "Suppression" or "restriction" would, perhaps, be better words. What we have here is a continuing combination in restraint of trade which was not unlawful in 1880 because there was no Sherman Act, but which is unlawful today and has been unlawful since the enactment of that statute. The Sherman Act has no implied "grandfather's clause." The first Sherman Act case decided by this Court involving railroads was *United States* v. *Freight Association,* (1897) 166 U. S. 290. There the combination found to be illegal had been formed before the

---

[9] Several of the applicable decisions were referred to in the complaint itself, Paragraph 6.

enactment of the Sherman Act. Nevertheless, it was held to be illegal and was dissolved. Cf. *United States* v. *Southern Pacific Company*, (1922) 259 U. S. 214, 234; *Norfolk Southern Bus Corporation* v. *Virginia Dare Transportation Co.*, (C.A. 4, 1947), 159 F. 2d 306.

In *New York, Chicago & St. Louis Railroad Company Control*, Docket No. 17,883, decided October 7, 1955, the Interstate Commerce Commission said that "competition exists in the meaning of Section 5 at any time that there is such an election of routes as may have an influence upon service or rates." A large number of routes of these two railroads would afford competition if such competition were not forcibly and artificially suppressed. The Interstate Commerce Commission, in a report to the United States Senate in 1915, *In Re: Financial Relations, Rates and Practices of the Louisville & Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway and Other Carriers*, 33 I.C.C. 168, said, in answer to Questions 3 and 4 propounded by the United States Senate:

> "The Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, with their respective connections, each form complete through routes between Mississippi and Ohio River crossings on the one hand and southern and eastern territory on the other; also between Nashville and southeastern territory; also between eastern points on the one hand and the Mississippi Valley, the west, northwest, and southwest on the other. Through routes which may be formed by each between the principal gateways are independent of those which may be formed by the other. In other words, the geographical relations of these two systems are such that were they separately controlled competition between them

would be the inevitable result. As will be shown below, the official records of these carriers clearly establish that the purchase of control of the Nashville, Chattanooga & St. Louis Railway by the Louisville & Nashville Railroad Company was primarily for the purpose of restricting competition and to maintain rates."

It is clear that the two railroads are potentially competitive. In *United States* v. *Aluminum Company of America,* (C. A. 2, 1945), 148 F. 2d 416, 429, the Court held that it makes no difference in a Sherman Act case whether existing competition is terminated or whether prospective competition is prevented. That same principle is applicable here. And it is no defense that corporations accused of conspiring to restrain trade have a common ownership. *United States* v. *Yellow Cab Co.,* (1947) 332 U. S. 218; *Kiefer-Stewart Co.* v. *Seagram & Sons,* (1951) 340 U. S. 211, 215; *Timken Co.* v. *United States,* (1951) 341 U. S. 593, 598. On the other hand, it is perfectly possible for corporations to compete where stock affiliation exists. In *Pennsylvania R. Co.* v. *Interstate Commerce Commission,* (C. A. 3, 1933) 66 F. 2d 37, the Court exonerated the Pennsylvania Railroad Company from violating the Clayton Act by purchasing the stock of the Lehigh Valley Railroad Company and the Wabash Railroad Company, where the evidence was that the stock had been purchased solely for investment, and that competition had not been substantially lessened between the companies.

The appellees consistently refused, both before the Commission and the District Court, to face this issue. So that there may be no question as to what the issue is, we emphasize that we do *not* contend either that

the acquisition of the N. & C. stock by the L. & N. was illegal or that its continued ownership is *per se* illegal. The illegality derives from the use of the stock ownership to maintain a combination in restraint of trade whereby the competition of the N. & C. is restricted and suppressed.[10]

The question remains whether or not this continuing violation of the Sherman Act by the two railroads here involved has any relevancy. The Commission has power to approve, as consistent with the public interest, the control of one railroad by another for the purpose of eliminating competition where there are countervailing advantages to the public interest. The Commission has never approved the suppression or restriction of the N. & C.'s competition by the L. & N. What the Commission has done here is to approve the second step of a merger as being consistent with the public interest, without having approved the first step; and in approving the merger, the Commission stated that the competitive situation was to be viewed as "different from a situation involving wholly independent carriers" (Sheet 44) and that there was disclosed in the record "no important effect from the elimination of such competition as now exists." (Sheet 47). Based on these premises, the Commission found that "the reduction in competition resulting from the merger would be consistent with the public interest." (Sheet 47).

An analogous situation was involved in the *Southern Pacific* case, above cited. The Southern Pacific had

---

[10] *United States* v. *E. I. du Pont de Nemours & Co.*, decided June 3, 1957, is authority for the proposition that even where the acquisition of stock was lawful, its subsequent use may violate the Clayton Act. *A fortiori*, it may violate the Sherman Act.

leased the lines of the Central Pacific and destroyed its competition before the enactment of the Sherman Act. After its enactment, the Southern Pacific acquired the stock of the Central Pacific. The Court said (259 U. S. 233):

> "We cannot accept the theory of prior practical consolidation as a justification for a violation of the Sherman Act resulting from the stock control acquired in 1899."

The Commission itself, in cases involving motor carriers, has adopted substantially the position which we advocate here and which we believe to be the correct application of the philosophy of the *McLean Trucking* decision. The Commission has held that the second step of approving a merger cannot be taken without also taking the first step of approving, and thereby legalizing, an existing unlawful situation. For example, in *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321 (1954), the Commission said, in rejecting a merger application:

> "In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether common control of these carriers should be sanctioned under the circumstances presented. In our opinion, this record shows such a flagrant disregard for the law that divestiture should be ordered."

The unlawfulness in that case derived from Section 5(4) of the Interstate Commerce Act. The principle is the same here, where the unlawfulness derives from

the Sherman Act. In considering whether this merger should be authorized as consistent with the public interest, the proper comparison is between the competitive situation which will exist after the merger and the competitive situation which *would* exist without a merger if there was no *unlawful* suppression of competition. The Commission has the power in a proper case to relieve a carrier from the antitrust laws, as was done in *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, after this Court had held that the Sherman Act had been violated. But in the instant case the Commission refused to consider the Sherman Act question.

Why the Commission rejected appellants' contention on this issue does not clearly appear in its report. Appellees sought in the District Court to justify the rejection on the theory that the Commission is not concerned with the enforcement of the Sherman Act. Nevertheless, the Sherman Act is a part of the transportation policy of Congress.[11] "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

---

[11] The Commission itself has recognized that this is true, saying, in *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5, 43, that "The policy of Congress is to be found not only in the consolidation provisions of the Interstate Commerce Act, but also in the antitrust acts." See also: "A Critique of: 'The Marasmus of The ICC: The Commission, The Railroads, and The Public Interest' ", 62 Yale Law Journal 171, by Charles S. Morgan, a member of the Interstate Commerce Commission staff, where the author comments (p. 200) on the Commission's "devotion to the principle of maintaining competition in the public interest."

Southern Steamship Co. v. National Labor Relations Board, (1942) 316 U. S. 31, 47.

This proposed merger would make permanent, but without any finding of the Commission that it is consistent with the public interest to do so, the restriction of competition accomplished in 1880 and maintained consistently since that time, as well as the additional reduction in competition which will directly result from the merger. The conclusion of the Commission that there was disclosed "no important effect from the termination of such competition as now exists" (Sheet 47) was the result of treating the existing situation as a *fait accompli* and refusing to question its lawfulness under the Sherman Act. We submit that this was an error of law on the part of the Commission, and that the District Court also erred in dismissing the question from consideration on the theory that there had been no showing of any violation of the antitrust laws. Finding of Fact No. 11 itself discloses such violation..

In two relatively unimportant respects the Commission intimated that it had given consideration to hypothetical situations. The restriction of the N. & C.'s competition by the L. & N. was formerly implemented, in part, by a written solicitation and routing agreement between the two railroads which was formally terminated before the report of the Commission, as was disclosed in the oral argument. (Tr. 1704). The Commission said (Sheets 42-43) that it had given consideration "to the possibility that the agreement might be nullified and competition between the railroads, if continued as separate entities, thereby increased, and to the fact that the possibility that such competition will be eliminated by the merger."

The solicitation and routing agreement was, however, merely evidence of the combination. Competition would not be restored by the abrogation of the written agreement, without more, and the "possibility" referred to was unreal.

Secondly, the Commission said that the advantages to the public interest from the merger outweighed the disadvantage to the single locality of Nashville, "even approaching this problem from the standpoint that the applicants are truly competitive." (Sheet 69). It is not clear what the Commission meant by this statement, after having held that they were not truly competitive. It is clear, however, that, aside from the effect on Nashville, the Commission considered only the effect on the public interest from the elimination of "such competition as now exists" without considering at all the competitive situation which would exist if the L. & N.'s relation to the N. & C. were comparable, for example, to the Pennsylvania's relation to the Wabash. *Pennsylvania R. Co.* v. *Interstate Commerce Commission, supra.*

We submit that the Commission's order was invalid because the Commission did not consider the disadvantage to the public from the elimination of the potential competition which would become an actuality if the two railroads were to cease violation of the Sherman Act; and that the District Court was in error in pretermitting the question on the theory that there was no showing of such violation.

QUESTION 3

Was Section 5(2)(c) of the Interstate Commerce Act correctly interpreted in connection with "the interest of the carrier employees affected," and should the District Court have dismissed the complaint after refusing to approve the Commission's order except upon an "express condition" which was not in the order?

In *Fort Worth & D. C. Ry. Co. Lease*, 247 I.C.C. 119, the Commission said, calling attention to the amendments made by the Transportation Act of 1940, (p. 127):

> "Railroad organization consists of four important and indispensable factors, namely, land, labor, capital and management. High specialization is necessary for each railroad factor. Whenever expert railroad labor is compelled to readjust and adapt itself to another industry, there is substantial loss to the individuals and to the general public. Congress has recognized this fact and in revising the statute has specifically required us to give consideration to 'the interest of the carrier employees affected.' Heretofore, we have given consideration to the interest of the carrier employees affected to the extent of imposing appropriate conditions in our order of approval. See *Chicago, R. I. & G. Ry Co., Trustees Lease*, 233 I. C. C. 21. We are now specifically required to give consideration to the interest of such employees in determining whether the transaction is consistent with the public interest. Under the proposed lease the future of any individual employee of the lessor would be uncertain.
>
> "Applicant contends that the proposed transaction is consistent with the public interest because of the savings that would result from the consolidation of shops and the dismissal of employees. Under the amended act it is obvious that the savings would be insignificant during the

period in which the employees would be protected by the provisions of our order complying with subparagraph (f). In other words, we are asked to give approval to this transaction based entirely on what the applicant believes will be the situation 4 or 5 years hence.

"Part of the alleged savings can be attained by modification of the reciprocal arrangement between the Burlington and the parties hereto, irrespective of our conclusion herein. The amount of future savings is uncertain and problematical. No present advantage in the public interest is shown."

The transaction in the *Fort Worth* case was disapproved for the reasons indicated in the foregoing paragraphs of the opinion. The Commission in the instant case distinguished the *Fort Worth* case on the sole ground that "initial control was to be attained" in that case "by a lease rather than a merger of properties which have been controlled by the dominant company, through stock ownership, for more than 75 years" (Sheet 65). In so doing, the Commission adopted identical language from the Examiner's proposed report, giving no reasons for overruling exceptions based on the contention that this was a distinction without a difference. Why the Commission overruled the exceptions is not clear, but whatever the reason, we submit that the Commission erred in not following its own precedent, which was a correct application of Section 5(2)(e).

The intervening railroads have contended that the *Fort Worth* case was wrongly decided, even if not distingnishable. The Commission did not say so. "The grounds upon which an administrative order must be judged are those upon which the record discloses that

its action was based." *Securities & Exchange Commission* v. *Chenery Corp.*, (1943) 318 U. S. 80, 87. We do not know how the Commission would have disposed of this issue if it had accepted the contention of the railroads that, in effect, item (4) of Section 5(2)(c) should be elided on the theory that compliance with Section 5(2)(f) makes it unnecessary to consider the interest of the employees under Section 5(2)(c). But it seems too clear for serious question that (f) did not repeal (c). Protective conditions under (f) may reduce, but not altogether eliminate, the disadvantages to be weighed under (c).

The District Court did not sustain the order of the Commission, as written, being of the opinion that the merger is not consistent with the public interest unless the rights of N. & C. employees are protected equally with the rights of L. & N. employees as respects seniority and other conditions of employment. (Conclusion of Law No. 11). In the absence of such a condition, the disadvantages to the public outweigh the advantages. But the Commission did not consider that there was *any* disadvantage to be considered under (c), after having imposed protective conditions under (f) which the District Court regarded as inadequate. Thus, the District Court disagreed with the Commission's interpretation. Nevertheless the District Court dismissed the complaint.

We submit that it is entirely clear that the District Court, instead of dismissing the complaint, should have issued the injunction prayed for. As said in *F. P. C.* v. *Idaho Power Company*, (1952) 344 U. S. 17, 20, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."

QUESTION 4

Were prejudicial procedural errors committed by the Commission in declining to issue a subpoena duces tecum and in unduly restricting cross-examination?

The application alleged (p. 31): "Investigations and studies of the operations of the two railroads disclose that by being operated under one management and control, the merged properties could produce transportation service more efficiently and economically than can be produced by operation of the properties under separate companies and managements." The application was verified by officers of the applicants, but the verification by the president of the Tennessee Company, W. S. Hackworth, contained this express exception: ". . . not including the statement of the economies and other advantages which would result from the proposed merger, such statements being those of other applicants based on studies conducted by them, . . ." (p. 58).

Interveners in opposition to the merger filed a petition with the Commission well in advance of the hearings asking, among other things, for the issuance of a *subpoena duces tecum* for the president of the Kentucky Company, requiring that he bring with him to the first hearing "a true copy of all reports of investigations in the files of applicant, Louisville & Nashville Railroad Company, and all studies of the operations of the two applicants which were given consideration in deciding on the proposed merger, and all correspondence relating thereto between the applicants." Division 4 of the Commission entered an order declining to issue this subpoena and in the final report of the Commission it was held that no error had been committed, the Commission stating

(Sheet 5): "The issuance of a subpoena is not a matter of right, in the absence of a showing of general relevance and reasonable scope of the evidence sought, . . ."

The president of the Kentucky Company, Mr. Tilford, testified at the hearings (Tr. 233) that the decision to merge was based on the studies in question. They included studies relating to the effect of the merger on revenues from freight traffic (Tr. 231-234), and a study with respect to how transportation service could be more effieiently produced (Tr. 235). When Mr. Tilford was asked to produce these studies, counsel for the L. & N. objected and the Examiner excluded the evidence. (Tr. 234-236)

Although the studies were excluded, it was later proved by testimony of Mr. W. K. Tate, former vice president in charge of traffic for the Tennessee Company, who held a similar position at the time of the hearings with the New York, New Haven & Hartford Railroad Company, that the original Kentucky Company traffic study estimated that more than $3,800,000 of freight traffic would be lost as the result of the merger, while Mr. Tate himself estimated a slightly smaller loss. (Tr. 1177-1180). The Kentucky Company witnesses testified, however, that their *final* judgment was that there would be no losses. (Tr. 115-116, 157-160, 1591-1598). Since traffic losses of the magnitude originally estimated would more than absorb any gross savings, and since the differing opinions on this subject could not be appraised without knowing the reasons for the opinions, the Commission should have been interested in the reasons given in the original Kentucky Company traffic study, which its counsel refused to produce. The reason-

ing might well have corroborated Mr. Tate's reasoning which he lucidly explained both on direct examination (Tr. 1180-1187) and on cross-examination (Tr. 1214-1225).

The Examiner's reasons for this and similar rulings were stated as follows in his proposed report (Sheets 70-71):

> "The Nashville interests continue to rely upon exceptions taken at the hearings in connection with the rulings of the examiner refusing to require the submission of additional information by the applicants. As in all applications filed under section 5(2) of the act, the burden of proof is on the applicants herein, and it is their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application. The information called for in the Commission's order dated October 14, 1940, with respect to such applications, may be used to guide the applicants in the matter. The applicants herein have complied with that order, and have submitted ample evidence sufficient and adequate to sustain the material allegations contained in the application. The studies and reports made by the freight traffic manager of the Kentucky Company, upon which the interveners in opposition so heavily rely, were not included as part of the applicants' case and need not be considered herein. . . ."[12]

---

[12] Mr. Tate testified that the first study estimated a gross loss of $3,865,887 (Tr. 1179), but in arriving at net loss there was erroneously applied the operating ratio of the Kentucky Company instead of merely deducting the out-of-pocket transportation expense, with the result that the study showed a net loss of only $601,408 after federal income taxes. The second and third reports or studies estimated progressively lower losses.

The full Commission approved the rulings of the Examiner, but with respect to the traffic studies added the statement (Sheet 71) that "extensive testimony with respect thereto was presented by interveners in opposition through the former vice president in charge of traffic for the Tennessee Company." The District Court held that if error was committed, it was non-prejudicial for this reason. It is true that this testimony gave the final figures in each of the studies; but since the studies themselves were excluded, neither the Examiner nor the Commission had the benefit of the reasons for the estimates, and could not compare them with the reasons given by Mr. Tate in support of his estimate. The result was that the Commission based its order on the assumption that there would be no traffic losses as the result of the merger.

The Examiner also excluded, on objection by applicants' counsel, figures called for on cross-examination to test the validity of other opinions expressed by Kentucky Company officers. The procedural theory was the same, viz., that since the burden of proof was on the applicants, it was their responsibility to decide at their own risk, the nature and kind of evidence to be presented. It is submitted that this theory would have supported a rejection of the application, but cannot support its approval.

One issue with respect to which cross-examination was unreasonably restricted was that of the gross savings and economies to be accomplished by the merger. It was undisputed that some savings and economies can be effected in any merger of connecting railroads from avoidance of "duplications of accounting, reporting, etc., between carriers and to regulatory authorities." (Sheet 70). It was also undisputed that

certain savings and economies could be effected by joint arrangements of a character which could also, however, be effected without a corporate merger. But applicants further contended that numerous employees could be eliminated by consolidating certain departments of the two railroads, such as the engineering department and the accounting department. The interveners contended that this could not be done without loss of efficiency *unless* these departments were *already* overstaffed.

For example, the head of the L. & N. accounting department testified that his department could take over the accounting work of the N. & C. with very little increase in personnel because the L. & N.'s accounting department was large enough to utilize machine accounting to advantage and the N. & C. accounting department was not. An indication of the trustworthiness or untrustworthiness of this statement would have been afforded by the employment figures of each of the two departments before machine accounting was installed, as compared with corresponding figures at the time of the hearing. The Examiner, however, refused to permit such figures to go into the record after counsel for the L. & N. stated that they were "unwilling" to furnish them. (Tr. 506-507, 834).

In Conclusion of Law No. 7(b), the District Court apparently adopted the theory of the railroads that this restriction on cross-examination was not prejudicial because the head of the L. & N. accounting department was present as a witness and was ready to testify as to whether or not his department was overstaffed. But counsel for interveners wished to obtain the figures,—not to ask an adverse witness for his conclusion or opinion, and certainly not to ask him

questions suggested by counsel for the railroads who introduced him as a witness. The error was clearly prejudicial, because counsel for interveners were prevented from exposing the lack of basis for applicants' claim.

The Examiner in his proposed report, and the Commission in its report (Sheet 52), accepted without question the contentions of applicants that savings of the character above referred to will be effected without loss in efficiency. If errors were committed in restricting cross-examination, as was done, the errors were prejudicial, as the result demonstrates. The Commission, after adopting the theory that applicants could decide for themselves what evidence to produce and what evidence to withhold, had little basis on which to reject applicants' estimates of gross savings. The ultimate conclusion that the merger is consistent with the public interest rests almost entirely on these estimated savings, together with inferences based thereon to the effect that greater efficiency and financial stability will result, which should enhance the adequacy of the service, etc.

The same theory was applied by the Examiner and approved by the Commission and by the District Court in connection with attempted cross-examination of applicants' witnesses with respect to the effect of a 1951 order by the L. & N. to the N. & C. to discontinue solicitation of traffic moving between Cincinnati and beyond and Atlanta and beyond. (Exhibit H-73). As the result of the L. & N. action, traffic which N. & C. solicitors were formerly able to move over the L. & N. to Nashville and from Nashville to Atlanta and vice versa, was now to be moved over the L. & N. route

through Knoxville. The actual effect of this order could have been seen by comparing the interchange figures between the two railroads at Nashville in the years 1951 through 1954 and observing the trend. Mr. Tilford was asked on cross-examination to furnish the interchange figures. Applicants contended that the effect on traffic was insignificant. They agreed to supply the figures for 1953 and 1954, but objected to supplying them for 1951 and 1952 on the ground that the figures were not "important enough to cause them that much trouble." (Tr. 233). The Examiner sustained the objection, and the District Court, in Conclusion of Law No. 7(e), apparently approved the Commission's action in overruling the exception to the Examiner's ruling on the theory that it was not necessary to require 1951 and 1952 figures because the applicants were willing to furnish the 1953 and 1954 figures. But the whole purpose of asking for the figures was to make a comparison and to indicate the trend. The 1953 and 1954 figures alone were worthless.

Section 5(2) of the Interstate Commerce Act provides in subparagraph (b) that the Commission "shall afford reasonable opportunities for interested parties to be heard." Title 5, U. S. Code, Section 1006(c), authorizes interveners "to conduct such cross-examination as may be required for a full and true disclosure of the facts." We submit that Congress intended a proceeding of this character to be conducted as an adversary proceeding and not as an *ex parte* proceeding. The refusal to issue the requested subpoena violated Title 5, U. S. Code, Section 1005(c). This error was compounded when the Examiner sustained the objections made by applicants to reasonable and proper cross-examination of their witnesses.

An order cannot be sustained where there is undue restriction on the right to cross-examine. *Reilly* v. *Pinkus*, (1949) 338 U. S. 269.

In his dissenting opinion in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 176, Mr. Justice Stone said:

> "The suggestion that an appropriate hearing upon evidence may be dispensed with because the rejected evidence would not have materially affected the outcome, seems to be based either on the assumption that the Board has in some way passed on the weight of the rejected evidence without hearing it, or that the Court is now free to appraise it and perform the function which the Board neglected to perform. Neither position is tenable. . . ."

And again (p. 177):

> "'One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion. *Interstate Commerce Commission* v. *Chicago, R.I. & P. Ry. Co.*, 218 U. S. 88, 102; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 75, 78; *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 304, 305."

It is believed that the foregoing philosophy is embodied in the Administrative Procedure Act. It was not observed in the proceeding before the Commission, and the District Court erred in failing to "hold unlawful and set aside" the action of the Commission

because it was "without observance of procedure required by law" after taking "due account of the rule of prejudicial error." (Title 5, U. S. Code, Section 1009(e)).

QUESTION 5

Did the District Court give full scope to its responsibilities with respect to judicial review?

The Administrative Procedure Act, Title 5, U. S. Code, Section 1009(e), requires the reviewing court to decide all relevant questions of law and to interpret statutory provisions. While the Commission must necessarily in the first instance interpret the law, it is the function of the Court not to defer to the Commission's interpretation, but to decide whether the Commission's interpretation is correct or incorrect.[13]

In Conclusion of Law No. 6 the District Court states: "An order of the Interstate Commerce Commission is entitled to great respect, representing as it does the opinion of a body of experts upon matters within the range of their special knowledge and experience," *Universal Camera Corp.* v. *National Labor Relations Board*, (1951) 340 U. S. 474, 488, is cited, as well as numerous cases decided before the enact-

---

[13] In "Judicial Review: Question of Law," 69 Harvard Law Review 239, 269, Professor Louis L. Jaffe says: "The expert judgment is rarely 'pure,' rarely determined solely by the criteria in its field. In most cases the administrative action will be as much determined by power drives and legal attitudes as it is by technical considerations." See also "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 Harvard Law Review 436, 448-9, where Professor Louis B. Schwartz says: "Is there an 'expertise' on the question of the relative importance of preserving competition which should induce judges to defer to commissioners? Or is this a question of general political and economic philosophy?"

ment of the Administrative Procedure Act and before the *Universal Camera* decision. In the instant case, the errors of law relied upon do not relate to matters of discretion within the special knowledge and experience of the Commission. They relate to the interpretation of the law, the procedure which was observed, and whether or not the Commission observed legal requirements in considering and weighing the evidence. In view of the fact that the *Universal Camera* decision was urged upon the District Court as having enlarged the scope of judicial review, it is significant that in Conclusion of Law No. 5 the Court did not say that, in making its determinations, it had reviewed the whole record, or such portions thereof as had been cited by counsel. Cf. *Radio Corp.* v. *United States*, (1951) 341 U. S. 412, 415.

QUESTIONS 6 AND 7

Did the Commission commit prejudicial errors of law in evaluating the evidence?

In the *McLean Trucking* case the Court interpreted the national transportation policy of Congress as requiring the Commission to consider the "advantages of improved service, safer operation, lower costs, etc.," and compare them with the effects of the curtailment of competition to determine whether the consolidation "will assist in effectuating the over-all transportation policy." As previously noted, the Commission found that no immediate and direct improvement in service is contemplated as the result of the merger.[14] Nevertheless the Commission included in its report several generalities, such as the statement: "On the whole we conclude that the merger would enhance the adequacy

[14] Infra (p. 16).

of service by the merged companies, and would constitute the best use of the facilities"; that "accompanying savings and improved efficiency of operation necessarily would strengthen the applicants, and render them capable of better service"; and that this "should, in the long run, result in improvement of the service which they otherwise would be able to render." (Sheet 69).

These generalities, which are conclusions rather than findings of fact, and were apparently so regarded by the District Court (see its Finding of Fact No. 10, commencing with the words: "The Commission concluded"), are unwarranted inferences from evidence of gross savings which applicants testified would result from the merger. A major portion of these gross savings are to come from the dismissal of employees. (Finding of Fact No. 13). It is obvious that elimination of employees may result in lower efficiency, deterioration of service, and loss of revenues. The following quotation from *Pennsylvania R. Co.* v. *Chamberlain,* (1933) 288 U. S. 333, 339, is pertinent:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of the two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. . . ."

There was positive and uncontradicted evidence that the larger railroad is already less efficient than the smaller with respect to such an important item as the maintenance cost of diesel locomotives. If the L. & N. had maintained its diesels at the same per unit

cost as the N. & C., it would have saved $4,368,972 in the year 1954. (Tr. 394-395). Applicants insisted that the unit cost was not the proper measure of comparison because the L. & N. operated its diesels a greater number of miles than the N. & C., and because of other factors claimed to be unfavorable to the L. & N. It developed, however, that on a unit *mile* basis, the L. & N. cost during the five-year period ending in 1954 was 18.95 cents as compared with 12.91 cents for the N. & C. (Tr. 1549-1555; Exhibit H-62, as corrected). The District Court, in Conclusion of Law No. 7(d), states that the Commission "rejected" the "contention that diesel locomotive repair costs are higher on the Louisville & Nashville than on the Nashville, Chattanooga & St. Louis." If the Commission did reject the contention (which is not entirely clear from the report), it did so without reason or basis, because the evidence was uncontradicted. In view of this evidence, the inference is plainly unwarranted that making the larger railroad still larger would result in greater efficiency.[15]

Conclusion of Law No. 7(d) further states that the Commission "rejected" the contention "that the merger would produce 'poorer' service." This contention, however, was based largely on applicants own evidence. There was evidence that by routing its through trains over the present N. & C. line between Memphis and Bruceton, the L. & N. proposes, after the merger, to convert its line between those points via Jackson into a secondary route and maintain it at lower cost than formerly. (Tr. 355-361). This will mean poorer service to Jackson, and to points served

[15] See footnote 6, p. 15, *infra*.

by lines which connect with the N. & C. at Jackson, an important junction. Through trains will no longer be routed through Jackson and it will no longer be possible to drop off from through trains at Jackson cars destined for Jackson proper or to connecting lines at Jackson, or for through trains to pick up cars at Jackson. (Tr. 1208-1209). Secondly, the L. & N. merely "hoped" to be able to "equal the present service" between Memphis and Nashville after consolidating the freight terminals at Memphis (Tr. 398); and the uncontradicted evidence was that the use of the L. & N. terminal at Memphis (after abandoning the present N. & C. terminal) would entail several hours delay. (Tr. 1206-1207). Thirdly, the applicants propose to abandon a car-ferry across the Tennessee River at Guntersville, Alabama. (Tr. 357). The Commission referred to the savings from these curtailments in service (Sheets 50 and 51), but ignored the poorer service to the public. If the contention was "rejected," we do not find in the report any statement as to the grounds or basis for the rejection.

The report shows that the Commission gave weight as a consideration in favor of the merger to the fact that "the numerous witnesses presented by the applicants overwhelmingly favored the proposed merger" (Sheet 47). It would have been strange, indeed, if the applicants had produced witnesses who did not favor it. The Commission also stated (Sheet 47) that it was "important to note that no other carrier has opposed the merger." (The obvious explanation is that other carriers will benefit by obtaining traffic which the applicants lose, as predicted by Mr. Tate).[16]

---

[16] See p. 31, *infra*.

On the other hand, the Commission gave scant attention to the testimony of Benjamin J. Brooks, transportation expert offered by interveners in opposition to the merger, who demonstrated the injury to the public at large because "the best use" of the transportation facilities of the two railroads will not be made if the merger is approved (Tr. 1236-1300); and the Commission failed to consider at all the circumstance that the president of the N. & C. was unable to verify the statements in the application regarding the alleged savings and economies and other advantages from the merger, and that no officer of the N. & C. took the stand to support any of the opinions given by the L. & N. officers. The Commission failed to consider and apply the rule stated, as follows, in *Interstate Circuit, Inc.* v. *United States*, (1938) 306 U. S. 208, 226:

> ". . . The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character. . . ."

The same doctrine is expressed in Wigmore on Evidence, Section 285, as follows:

> "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause."

It would be premature and inappropriate at this stage to elaborate further upon the lack of support in the record for the vague generalities contained in the report of the Commission with respect to efficiency and service. An examination of such portions of the record as have been cited by appellants in the complaint and in their briefs, together with portions cited

by appellees, will reveal clearly that the order was not "supported by and in accordance with the reliable, probative and substantial evidence" in the record, taking into account the fact that the applicants had the burden of proof. (Title 5, U. S. Code, Section 1006(e)). This proposition will be elaborated in appellants' brief if probable jurisdiction is noted.

QUESTION 8

Did the report of the Commission meet the requirements of the Administrative Procedure Act?

The report contains a large amount of background material, and the contentions of the applicants and interveners in opposition on the major issues are stated; but it is difficult to ascertain just which contentions of the applicants are actually accepted, and why. The ultimate findings or conclusions, in the language of the statute, are not based on subsidiary findings that can be easily identified, and for which "the reasons or basis" are stated, as required by Title 5, U. S. Code, Section 1007(b). In the main, the report is merely a verbatim report of the proposed report of the Examiner, followed by the statement (Sheet 71):

> "Exceptions and requested findings not specifically discussed herein, or reflected in our findings or conclusions, have been given consideration and found not justified."

It is impossible to determine from the report just how, where and in what respects the merger "would enhance the adequacy of service by the merged companies and would constitute the best use of the facilities." (Sheet 69). The report "leaves foggy the basis of its conclusions" on all the issues involved in the questions previously discussed. *Secretary of Agriculture* v. *United States*, (1956) 350 U. S. 162, 175.

QUESTION 9

Was the conclusion "that the transaction will be consistent with the public interest" supported by the record?

The reasons for answering this question in the negative have heretofore been summarized.

QUESTION 10

Is it a matter of national concern (assuming that the order is otherwise valid) whether the two railroads "consolidate" under state law, or "merge" under a nonexistent law; and if so, is that issue justiciable in this cause?

The application to the Commission was for an order "approving and authorizing the merger of the properties and franchises of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company . . ." There was filed as Exhibit 7, to the application an "Agreement of Merger" dated December 16, 1954. The agreement provides that the Kentucky Company shall continue to be a corporation organized and existing under the laws of Kentucky, but that the separate corporate existence of the Tennessee Company shall cease. According to this proposed merger agreement, there will no longer be a Tennessee corporation.

The charter of the Nashville, Chattanooga & St. Louis Railway (Acts Tennessee 1845-6, ch. 1), and amendments thereto, which constitute a contract with the State of Tennessee, contain no authorization for such a merger, nor is there any general law of Tennessee which authorizes it. Tennessee Code Sections 65-901 to 65-908, inclusive, expressly authorize consolidations of railroads; and under these sections, and corresponding Kentucky law (KRS 271.465 et seq.) the two railroads could consolidate, and the resulting corporation would be a Kentucky corporation in Ken-

tucky and a Tennessee corporation in Tennessee. Cf. *Memphis, Etc. R.R. Co.* v. *Alabama*, (1882) 107 U. S. 581; *Nashua Railroad* v. *Lowell Railroad*, (1890) 136 U. S. 356; *Town of Bethel* v. *Atlantic Coast Line R. Co.*, (C.A. 4, 1936) 81 F. 2d 60.

There are, of course, important differences between a merger and a consolidation (see *Keokuk & Western Railroad Co.* v. *Missouri*, (1894) 152 U. S. 301; *Akwell Corporation* v. *Eiger*, (D. C. N. Y., 1956) 141 F. Supp. 19). It is well settled that authority for a transaction of this character must be clearly, distinctly and expressly conferred by some express provision of the law. *Knapp* v. *Golden Cross*, (1908) 121 Tenn. 212. The union of the two railroads here involved must take place under Kentucky and Tennessee law. Congress might, had it chosen, have enacted a federal corporation law for interstate carriers, under which they might "consolidate" or "merge"; but Congress disclaimed any such intention in Section 5(11) of the Interstate Commerce Act.

In *Texas* v. *United States*, (1934) 292 U. S. 522, 533, the Court recognized the clear distinction between the supervision of the state "in matters essentially of state concern," and the supervision of the federal government with respect to "operations which in their effect upon interstate commerce are of national concern." In the instant case the Commission made no finding which suggests that, in any degree whatever, it is a matter of national concern for the N. & C. to be *merged* into the L. & N. rather than for the two railroads to *consolidate* into a new corporation. Presumably the Tennessee legislature had valid reasons for authorizing

consolidations but not mergers of this character, involving questions essentially of state concern."[17]

The applicants have themselves suggested no reason for seeking to do something which state law does not permit instead of seeking to accomplish their purpose in conformity with state law. The question was promptly called to the attention of the Commission by a motion to dismiss filed long before the hearings, and applicants had ample opportunity to file a new application, or seek permission to amend their application by substituting a consolidation agreement for the "Agreement of Merger" filed as Exhibit 7 to the application. Instead, they chose to sink or swim on their application to merge the Tennessee Company into the Kentucky Company and not consolidate.

The order of the Interstate Commerce Commission is "permissive and not mandatory." *New York Central Securities Co.* v. *United States,* (1932) 287 U. S. 12, 26. The principle of *Claiborne-Annapolis Ferry* v. *United States;* (1932) 285 U. S. 382, is applicable. In that case the Commission authorized a railroad company to build and operate a ferry. It was contended that the railroad company under its charter had no power to operate a ferry. The Court said (p. 391):

> "Whether the Railway Company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding. We think Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before grant-

[17] For example, the method of transferring title to real estate is a matter of state concern. Tennessee has not authorized the N. & C. to transfer its real estate to the L. & N. in the manner proposed.

ing or withholding assent to the construction of an extension. *Cleveland, C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404, 414."

Applying this principle, it would be premature at this stage to rule upon the question whether Section 5(11) of the Interstate Commerce Act constitutes, in substance and effect, an amendment to Sections 65-901 - 65-908 of the Tennessee Code, so as to authorize this proposed merger. We submit our views, however, out of an abundance of caution and to avoid a later contention of *res adjudicata*.

Appellees rely upon *Seaboard Air Line Railroad Co.* v. *Daniel*, (1948) 333 U. S. 118. This was not a suit to annul and set aside an order of the Interstate Commerce Commission. It was a suit brought by the railroad company against the Attorney-General of South Carolina to enjoin him from enforcing against it certain state laws forbidding foreign corporations to own or operate railroads in the state. The Seaboard Air Line had, with the approval of the Interstate Commerce Commission, succeeded to the ownership and operation of a railroad system with lines traversing South Carolina. The Commission's report contained a finding that compliance with the South Carolina railroad corporation laws would result in "substantial delay and needless expense," and the order affirmatively authorized the railroad company, a Virginia corporation, to own and operate the South Carolina properties without complying with the South Carolina railroad corporation laws. The Court held that this order of the Commission was authorized by Section 5(11) of the Interstate Commerce Act and was valid.

In the instant case there is no finding by the Commission or by the District Court, and indeed no contention, that a consolidation could not be accomplished

with the same speed and with as little expense as a merger. No prohibitory state law is involved. As to procedure, the *Seaboard Air Line* case supports the position here taken that a separate action is necessary to determine the issue. If and when the railroads are ready to tender their merger agreement to the Secretary of State of Tennessee for filing and recording, they can bring an action in which they can insist upon the position here taken and obtain a declaratory judgment.

If, however, the Court should be of the opinion that a justiciable question is properly raised in this proceeding, and is not premature, we insist that Congress had no intention of amending Sections 65-901 - 65-908 of the Tennessee Code, or granting power to do so to the Interstate Commerce Commission, so as to authorize a merger of this character; but that if Congress did have such intention, and if Section 5(11) of the Interstate Commerce Act be so construed, then it violates the Tenth Amendment. On this question, *Hopkins Savings Association* v. *Cleary,* (1935) 296 U. S. 315, is believed to be directly in point.

Conclusions of Law Nos. 3 and 4 do not meet the issue here presented. The District Court concluded that the Commission was empowered to authorize the merger of the N. & C. into the L. & N. "without regard to the provisions of the laws of any state" and by its order had for its purpose to authorize the merger, "state law notwithstanding," except with respect to the size of the stockholder vote required for approval of the merger. The issue presented, however, is not with respect to positive provisions of the law of Tennessee,—it is with respect to the *absence* of any provision under which this type of merger, rather than a consolidation, may be accomplished. These Conclu-

sions of Law do not meet this issue and we are left without any clear indication as to what the District Court actually intended to decide.

QUESTION 11

Did the plaintiff and intervening plaintiff have "standing" to attack the order of the Commission because Mercantile-Safe Deposit & Trust Company of Baltimore was not a party and the Commission did not find that acquisition of control of the Tennessee Company by it would be consistent with the public interest?

The District Court, without applying Section 5(4) of the Interstate Commerce Act as construed in *United States* v. *Marshall Transport Co.*, (1944) 322 U. S. 31, and *Alleghany Corporation* v. *Breswick & Co.*, decided April 22, 1957, held that appellants could not attack the order on the ground in question, (1) because their legal interests were not adversely affected, and (2) because they did not raise the question before the Commission. If they had no standing to raise the question before the Court, because their legal interests were not adversely affected, they had no standing to raise it before the Commission. If the first reason is good, the second is bad, and *vice versa.* Actually the Commission could and should have raised the question *sua sponte,* and since it did not do so, the District Court was authorized to decide it when brought to its attention. Whether technically "jurisdictional" or not is irrelevant.[18]

In *National Labor Relations Board* v. *Highland Park Mfg. Co.*, (1951) 341 U. S. 322, involving review of administrative action, consisting of an order requiring an employer to deal with a union whose officers had not filed an affidavit that they were not members of the Communist Party, the Court said:

---

[18] See "Standing to Challenge Governmental Action," 39 Minnesota Law Review 353, 374-381.

"It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

In the instant case the merger of the N. & C. into the L. & N., pursuant to the approval given by the Commission, would be in violation of Section 5(4) because Mercantile-Safe Deposit & Trust Company was not a party and the Commission has not found that its acquisition of control of the Tennessee Company would be "consistent with the public interest." The Trust Company and all other participants would be equally guilty. How can an order be valid if it cannot be lawfully complied with?

These appellants should be permitted to call this matter to the attention of the Court, even though it was not called to the attention of the Commission. We do not assert that the Commission should not be permitted to pass upon the question first. Appellants do not, however, control the protocol which should be observed. The Commission entered a final order which did not provide that interveners could move to reconsider and thereby obtain an automatic stay. The appellants then raised the question in their complaint, as amended. The District Court refused to consider the question at all. We believe this was erroneous.

QUESTION 12

Whether the judgment should be reversed because the order of the Commission did not comply with the thirty-day requirement of Section 15(2) of the Interstate Commerce Act.

The order of the Commission was not released until March 13, 1957, but was effective forty days from the date it bore, March 1, 1957,—in other words, it was effective twenty-seven days from its date of release. It is submitted that the order was void and could not be made valid by subsequently extending its effective date three more days, as the Commission did after the complaint was filed, or by suspending it and later reinstating the original order with a new effective date. The harm which Section 15(2) sought to prevent,—insufficient time for the preparation and filing of proceedings for review,—had already been accomplished.

Respectfully submitted,

ALLISON B. HUMPHREYS,
Solicitor General,
State of Tennessee.

HAROLD SELIGMAN,
General Counsel, Tennessee
Public Service Commission.

WILLIAM WALLER,
Special Counsel for City of
of Nashville and Davidson
County.

Attorneys for Appellants.

Of Counsel:

GEORGE F. MCCANLESS,
Attorney General, State of Tennessee.

HENRY C. FOUTCH,
Assistant Attorney General, State of Tennessee.

ELMER D. DAVIES, JR.,
Attorney for Davidson County, Tennessee.

LA ROE, WINN & MOERMAN,
Investment Building, Washington 5, D. C.

WALLER, DAVIS & LANSDEN,
American Trust Building, Nashville 3, Tennessee.